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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 DEMETRIOUS STEWART,

9 Plaintiff,

10 v.

11 E.K. McDANIEL, *et. al.*,

12 Defendants.

Case No. 3:16-cv-00046-MMD-WGC

ORDER ACCEPTING AND ADOPTING
REPORT AND RECOMMENDATION OF
MAGISTRATE JUDGE
WILLIAM G. COBB

13 **I. SUMMARY**

14 Before the Court is the Report and Recommendation of United States Magistrate
15 Judge William G. Cobb (ECF No. 49) ("R&R") relating to Defendants' Motion for
16 Summary Judgment ("Defendants' Motion") (ECF No. 26). The Magistrate Judge
17 recommends granting Defendants' Motion. Plaintiff filed an objection ("Objection") (ECF
18 No. 50) to which Defendants have responded. (ECF No 51). On December 20 2017,
19 Defendants filed suggestion of death of Plaintiff pursuant to Fed. R. Civ. P. 25(a)(1).
20 (ECF No. 53.) Defendants ask the Court to dismiss this action because Plaintiff is
21 deceased. (*Id.*) However, because the parties have fully briefed Defendants' Motion and
22 Plaintiff's Objection, the Court addresses the merits of these filings to avoid the need for
23 the Court to rule on whether the claims are extinguished upon Plaintiff's death.¹ For the
24 reasons discussed herein, the Court accepts and adopts the R&R in full.

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26 ¹Fed. R. Civ. P. 25(a)(1) provides:

27 If a party dies and the claim is not extinguished, the court may order
28 substitution of the proper party. A motion for substitution may be made by
any party or by the decedent's successor or representative. If the motion is
not made within 90 days after service of a statement noting the death, the
action by or against the decedent must be dismissed.

1 **II. BACKGROUND**

2 Plaintiff was an inmate in the custody of the Nevada Department of Corrections
3 ("NDOC") and incarcerated at Lovelock Correctional Center. Following screening, the
4 Court permitted Plaintiff to proceed on his single claim for Eighth Amendment deliberate
5 indifference to a serious medical need. (ECF No. 5 at 5.) Plaintiff claimed that he
6 required special shoes that were prescribed to him that would meet his medical
7 conditions and Defendants refused to permit him to have these shoes. (ECF No. 1-1 at
8 3-4.) The relevant facts are further recited in the R&R, which this Court adopts.

9 **III. DISCUSSION**

10 This Court "may accept, reject, or modify, in whole or in part, the findings or
11 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
12 timely objects to a magistrate judge's report and recommendation, then the court is
13 required to "make a *de novo* determination of those portions of the [report and
14 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of Plaintiffs'
15 objections, the Court has engaged in a *de novo* review to determine whether to adopt
16 Magistrate Judge Cobb's recommendation. Where a party fails to object, however, the
17 court is not required to conduct "any review at all . . . of any issue that is not the subject
18 of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has
19 recognized that a district court is not required to review a magistrate judge's report and
20 recommendation where no objections have been filed. *See United States v. Reyna-*
21 *Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by
22 the district court when reviewing a report and recommendation to which no objections
23 were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003)
24 (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the view that district
25 courts are not required to review "any issue that is not the subject of an objection.").
26 Thus, if there is no objection to a magistrate judge's recommendation, then the court
27 may accept the recommendation without review. *See, e.g., Johnstone*, 263 F. Supp. 2d

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1 at 1226 (accepting, without review, a magistrate judge's recommendation to which no
2 objection was filed).

3 The Magistrate Judge recommends denying summary judgment based on
4 Defendants' administrative exhaustion affirmative defense. Defendants do not object to
5 this recommendation. The Court thus adopts this recommendation.

6 In light of Plaintiff's objection to the recommendation to grant summary judgment
7 in favor of Defendants on the merits of his claim, the Court has engaged in a *de novo*
8 review. The Magistrate Judge found that it was undisputed that Plaintiff was not issued
9 the shoes his family had ordered for him because they came from an unauthorized
10 vendor (Walkenhorst's) and that the same shoes were available from the prison's
11 authorized vendor. (ECF No. 49 at 7-9.) Based on these undisputed evidence, the
12 Magistrate Judge found that Plaintiff cannot demonstrate that Defendants were
13 deliberately indifferent to a serious medical need. Having reviewed the briefs relating to
14 Defendants' Motion and Plaintiff's objection, the Court agrees with the Magistrate
15 Judge's findings and recommendation.

16 The arguments Plaintiff raised in his Objection are not enough to create a genuine
17 issue of material fact to defeat summary judgment. For example, Plaintiff argued that the
18 Magistrate Judge failed to consider evidence that another inmate was permitted to
19 obtain shoes from the unauthorized vendor. (ECF No. 50 at 2.) However, the Magistrate
20 Judge did consider this evidence and correctly found that it did not raise a genuine issue
21 of material fact to show that Defendants were deliberately indifferent to Plaintiff's medical
22 condition. (ECF No. 49 at 9-10.) As another example, whether or not William Sandie
23 ever talked to Plaintiff's family member (which Plaintiff disputed (ECF No. 50 at 3) and
24 whether his family would take the refund from the returned shoes to order shoes from
25 the prison's authorized vendor (*id.* at 4) are not material to Plaintiff's claim.

26 In sum, the Court agrees with the Magistrate Judge's findings and will adopt the
27 R&R.

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1 **IV. CONCLUSION**

2 It is therefore ordered, adjudged and decreed that the Report and
3 Recommendation of Magistrate Judge William G. Cobb (ECF No. 49) is accepted and
4 adopted in full.

5 It is further ordered that Defendants' Motion for Summary Judgment (ECF No. 26)
6 is granted.

7 The Clerk is directed to enter judgment in favor of Defendants and close this
8 case.

9 DATED THIS 27th day of December 2017.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE